

source other than the alien, that evidence shall be made a part of the record of proceeding, and shall be provided to the alien. If the alien elects to submit a response to such additional evidence, such response must be filed with the Service within 10 calendar days of service of the additional evidence (or 13 calendar days if service is by mail). If the deciding Service officer finds, after considering all additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(iii) *Conversion to proceedings under section 240 of the Act.* If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) *Termination of proceedings by deciding Service officer.* Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act.* In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

(f) *Executing final removal order of deciding Service officer—(1) Time of execution.* Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with §241.2 of this chapter; such warrant shall be executed no

sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14-day period.

(2) *Country to which alien is to be removed.* The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in §287.5(e)(2) of this chapter. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.

## PART 239—INITIATION OF REMOVAL PROCEEDINGS

Sec.

239.1 Notice to appear.

239.2 Cancellation of notice to appear.

239.3 Effect of filing notice to appear.

AUTHORITY: 8 U.S.C. 1103, 1221, 1229; 8 CFR part 2.

SOURCE: 62 FR 10366, Mar. 6, 1997, unless otherwise noted.

**§ 239.1 Notice to appear.**

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the Immigration Court. Any immigration officer performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such an alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear:

- (1) District directors (except foreign);
- (2) Deputy district directors (except foreign);
- (3) Assistant district directors for investigations;
- (4) Deputy assistant district directors for investigations;
- (5) Assistant district directors for deportation;
- (6) Deputy assistant district directors for deportation;
- (7) Assistant district directors for examinations;
- (8) Deputy assistant district directors for examinations;
- (9) Officers in charge (except foreign);
- (10) Assistant officers in charge (except foreign);
- (11) Chief patrol agents;
- (12) Deputy chief patrol agents;
- (13) Associate chief patrol agents;
- (14) Assistant chief patrol agents;
- (15) Patrol agents in charge;
- (16) The Assistant Commissioner, Investigations;
- (17) Service center directors;
- (18) Deputy center directors;
- (19) Assistant center directors for examinations;
- (20) Supervisory asylum officers;
- (21) Institutional Hearing Program directors; or
- (22) Deputy Institutional Hearing Program directors.

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

**§ 239.2 Cancellation of notice to appear.**

(a) Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursu-

ant to § 3.14 of this chapter provided the officer is satisfied that:

- (1) The respondent is a national of the United States;
- (2) The respondent is not deportable or inadmissible under immigration laws;
- (3) The respondent is deceased;
- (4) The respondent is not in the United States;
- (5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
- (6) The notice to appear was inadvertently issued, or
- (7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.

(b) A notice to appear issued pursuant to section 235(b)(3) of the Act may be canceled under provisions in paragraphs (a)(2) and (a)(6) of this section only by the issuing officer, unless it is impracticable for the issuing officer to cancel the notice.

(c) *Motion to dismiss.* After commencement of proceedings pursuant to § 3.14 of this chapter, Service counsel, or any officer enumerated in paragraph (a) of this section may move for dismissal of the matter on the grounds set out under paragraph (a) of this section. Dismissal of the matter shall be without prejudice to the alien or the Service.

(d) *Motion for remand.* After commencement of the hearing, Service counsel, or any officer enumerated in paragraph (a) of this section may move for remand of the matter to district jurisdiction on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Service.

(e) *Warrant of arrest.* When a notice to appear is canceled or proceedings are terminated under this section any outstanding warrant of arrest is canceled.

(f) *Termination of removal proceedings by immigration judge.* An immigration

judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

**§ 239.3 Effect of filing notice to appear.**

The filing of a notice to appear shall have no effect in determining periods of unlawful presence as defined in section 212(a)(9)(B) of the Act.

**PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES**

**Subpart A—Removal Proceedings**

- Sec.
- 240.1 Immigration judges.
  - 240.2 Service counsel.
  - 240.3 Representation by counsel.
  - 240.4 Incompetent respondents.
  - 240.5 Interpreter.
  - 240.6 Postponement and adjournment of hearing.
  - 240.7 Evidence in removal proceedings under section 240 of the Act.
  - 240.8 Burdens of proof in removal proceedings.
  - 240.9 Contents of record.
  - 240.10 Hearing.
  - 240.11 Ancillary matters, applications.
  - 240.12 Decision of the immigration judge.
  - 240.13 Notice of decision.
  - 240.14 Finality of order.
  - 240.15 Appeals.
  - 240.16 Application of new procedures or termination of proceedings in old proceedings pursuant to section 309(c) of Public Law 104-208.
  - 240.17—240.19 [Reserved]

**Subpart B—Cancellation of Removal**

- 240.20 Cancellation of removal and adjustment of status under section 240A of the Act.
- 240.21 Suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect before April 1, 1997) and cancellation of removal and adjustment of status under section 240A(b) of the Act for certain nonpermanent residents.
- 240.22—240.24 [Reserved]

**Subpart C—Voluntary Departure**

- 240.25 Voluntary departure—authority of the Service.
- 240.26 Voluntary departure—authority of the Executive Office for Immigration Review.
- 240.27—240.29 [Reserved]

**Subpart D—Exclusion of Aliens (for Proceedings Commenced Prior to April 1, 1997)**

- 240.30 Proceedings prior to April 1, 1997.
- 240.31 Authority of immigration judges.
- 240.32 Hearing.
- 240.33 Applications for asylum or withholding of deportation.
- 240.34 Renewal of application for adjustment of status under section 245 of the Act.
- 240.35 Decision of the immigration judge; notice to the applicant.
- 240.36 Finality of order.
- 240.37 Appeals.
- 240.38 Fingerprinting of excluded aliens.
- 240.39 [Reserved]

**Subpart E—Proceedings to Determine Deportability of Aliens in the United States: Hearing and Appeal (for Proceedings Commenced Prior to April 1, 1997)**

- 240.40 Proceedings commenced prior to April 1, 1997.
- 240.41 Immigration judges.
- 240.42 Representation by counsel.
- 240.43 Incompetent respondents.
- 240.44 Interpreter.
- 240.45 Postponement and adjournment of hearing.
- 240.46 Evidence.
- 240.47 Contents of record.
- 240.48 Hearing.
- 240.49 Ancillary matters, applications.
- 240.50 Decision of the immigration judge.
- 240.51 Notice of decision.
- 240.52 Finality of order.
- 240.53 Appeals.
- 240.54 [Reserved]

**Subpart F—Suspension of Deportation and Voluntary Departure (for Proceedings Commenced Prior to April 1, 1997)**

- 240.55 Proceedings commenced prior to April 1, 1997.
- 240.56 Application.
- 240.57 Extension of time to depart.

**Subpart G—Civil Penalties for Failure to Depart [Reserved]**

AUTHORITY: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; sec. 202, Pub. L. 105-100 (111 Stat. 2160, 2193); 8 CFR part 2.